

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 1:19cr59
)	
DANIEL EVERETTE HALE)	

GOVERNMENT’S MOTION FOR JUDICIAL NOTICE

The United States hereby moves the Court to take judicial notice of the system for classifying, safeguarding, and declassifying national security information as laid out in Executive Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) (attached hereto as Exhibit A). As discussed below, judicial notice of this system of classification is not only proper under Federal Rule of Evidence 201, but is required by the Federal Register Act. *See* 44 U.S.C. § 1507 (“The contents of the Federal Register shall be judicially noticed . . .”).

I. Judicial Notice of Relevant Federal Register Materials is Required

Federal Rule of Evidence 201 states that the Court “may judicially notice a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Rule 201 further states that “the court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information.” *Id.* at 201(c)(2). Judicial notice may be taken at any stage of the proceeding. *Id.* at 201(d).

Of import here, the contents of the Federal Register are the type of public records subject to judicial notice. *See, e.g., United States v. Ahlstrom*, 530 F. App’x 232, 239 n.5 (4th Cir. 2013)

(citing 44 U.S.C. § 1507). In fact, the Federal Register Act requires judicial notice of the contents of the Federal Register. *See* 44 U.S.C. § 1507 (“The contents of the Federal Register shall be judicially noticed . . .”). *See also Ebersole v. Kline-Perry*, No. 1:12-CV-26 JCC/TRJ, 2012 WL 2673150, at *6 (E.D. Va. July 5, 2012) (Cacheris, J.) (“the Federal Register Act requires judicial notice of federal regulations”). The only requirement for judicial notice of Federal Register materials is that the materials be relevant to the given proceeding. *Id.*¹

II. Background and Relevance of Executive Order 13526

Executive Order 13526 was issued by President Obama on December 29, 2009, and subsequently published in the Federal Register on January 5, 2010. The Order “prescribes a uniform system for classifying, safeguarding, and declassifying national security information.” Executive Order No. 13526, 75 Fed. Reg. 707 (Dec. 29, 2009) (Ex. A). The system provides for classification levels and criteria for classification at the “top secret,” “secret,” and “confidential” levels.

Defendant is charged with retaining, delivering, and communicating, and attempting to deliver and communicate national defense information to persons not entitled to receive it. The national defense information at issue in this case is contained across several different documents classified pursuant to Executive Order 13526. The Executive Order and the system it prescribes are relevant to the determination of whether these documents constitute national defense information. *See, e.g., United States v. Dedeyan*, 584 F.2d 36, 40 (4th Cir. 1978) (upholding ruling below and quoting lower court’s statement that the fact of classification tends “to show or make more probable that the document does, in fact relate to the national defense”). The criteria used in classifying documents as well as the provisions regarding safeguarding and properly declassifying

¹ Internal citations and quotations are omitted throughout this pleading.

materials speak to the sensitive nature of the classified documents at issue and are relevant to proving an essential element of the charges against Defendant.

Conclusion

The requirements for judicial notice of Executive Order 13526 are satisfied in this case. The Order prescribing the government's classification system is clearly reflected in the Federal Register, which is subject to judicial notice pursuant to 44 U.S.C. § 1507. There can be no factual dispute as to the accuracy of these official records from the Federal Register. Additionally, the system prescribed in the Executive Order is relevant to this case because conviction under Section 793 requires a showing that the information at issue is national defense information. The prescribed system speaks to the sensitive nature of these documents as well as the government's attempts to safeguard the information.

Accordingly, the government respectfully requests that the Court take judicial notice of Executive Order 13526 and the system prescribed therein.

Respectfully submitted,

G. Zachary Terwilliger
United States Attorney

By: _____/s/
Gordon D. Kromberg
Assistant United States Attorney
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: 703-299-3700
Fax: 703-299-3981
Gordon.kromberg@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing copy of the GOVERNMENT'S MOTION FOR JUDICIAL NOTICE with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record.

By: /s/
Gordon D. Kromberg
Assistant United States Attorney
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: 703-299-3700
Fax: 703-299-3981
Gordon.kromberg@usdoj.gov